In the Supreme Court of the United States

OCTOBER TERM, 1945

No. 343

THOMAS W. NEALON,
Petitioner,

vs.

HARRY W. HILL, as Receiver of INTERMOUNTAIN BUILDING & LOAN ASSOCIATION, a corporation,
Respondent.

Brief for the Respondent in Opposition to Petition for Writ of Certiorari

UPON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

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OPINION BELOW

The District Court made its final order fixing attorney's fees and expenses and ordering payment of balance due Thomas W. Nealon on December 7th, 1942 (R. 243-248), but wrote no opinion.

The opinion of the Circuit Court of Appeals (R. 704) is reported in 149 Fed.(2) 883 (Advance Sheets).

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on June 29th, 1945 (R. 707-708). The petition for a rehearing was filed on July 20th, 1945, and denied on July 23rd, 1945, and the mandate of the Circuit Court of Appeals was stayed to and including August 31st, 1945 (R. 708-709). The jurisdiction of this Court is sought to be invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13th, 1925 (28 U.S.C.A., Section 347).

STATEMENT OF THE CASE

The summary statement of matters involved beginning on page 3 of Petitioner's Petition for Writ of Certiorari is substantially correct as far as it goes, as is also the summary of facts in his Brief (page 15, et seq.), but respondent believes that a step by step statement will more materially aid this Court in passing on the questions presented in the petition.

On October 17th, 1937, petitioner filed in the District Court his petition for allowance of attorney's fees for legal services rendered and expenses incurred (R. 108-164).

Thereafter, one Elizabeth G. Monaghan filed in that Court her petition for allowance of attorney's fees and for expenses incurred (R. 43-108).[1]

On December 20th, 1937, a hearing was had on both petitions and at the conclusion thereof both the petitions of petitioner and Elizabeth G. Monaghan were taken under advisement (R. 593).

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1. *Monaghan v. Hill* (9 Cir.), 140 Fed.(2d) 31.

On February 18th, 1938, the District Court made and entered its order allowing petitioner $5,000 and authorized, empowered and directed the respondent receiver to pay said sum of $5,000 and in that order retained its jurisdiction "to make and enter such other and further order in the premises as to it shall seem just and equitable" (R. 595-596).

On March 3rd, 1939, the District Court entered a further order for allowance and payment of attorney's fees for legal services rendered by petitioner, reciting the allowance of February 18th, 1938, above adverted to, and ordering an additional $2,500 allowed to appellant on account, and authorizing, empowering and directing the receiver to pay such additional sum. The District Court likewise in its order of March 3rd, 1939, retained its jurisdiction "to make such other and further order in the premises as to it may seem just and equitable" (R. 597-598).

On December 7th, 1942, the District Court entered its "Final Order Fixing Attorney's Fees and Expenses, and Ordering Payment of Balance Due to Thomas W. Nealon" (R. 243-248), in which final order there were recited the payments of $5,000 in February, 1938, and $2,500 additional in March, 1939, and fixing the total fees of both Monaghan and petitioner at $25,000, and awarding petitioner one-half of said sum, less the $7,500 theretofore paid him on account, pursuant to former orders of the District Court.

In the final order of December 7th, 1942, a further allowance of $1,330.40 was made petitioner to cover "out of pocket" expenses claimed by him (R. 247).

There was further recited in that order that between the dates of December 1st, 1935, and April 1st, 1937, petitioner received $7,344 covering salary and expenses as one of the attorneys for the former Receiver, Henry S. McCluskey (R. 246). The balance of the fee allowed petitioner, to-wit, $5,000, and the out-of-pocket expenses amounting to $1,330.40, were ordered paid by the respondent and petitioner was decreed to have a lien upon the assets of the Loan Association until such sums were paid (R. 247). It was

> "Further Ordered, Adjudged and Decreed * * * that this is a final allowance and covers all services heretofore rendered by said Thomas W. Nealon as set forth in his petition and as attorney for the former Receiver" (R. 247).

Subsequent to the entry of the final order of December 7th, 1942, and on the 10th day of December, 1942, and strictly in accordance with such final order, the respondent paid to petitioner and petitioner accepted from the respondent, $6,330.40, covering following items specified in the voucher check (R. 642), to-wit:

"Date of Invoice No.	*Items*	*Amount*	*Total*
B-202—	Final Payment in Full Settlement of Attorney Fees per Order of Court of December 7, 1942	$5,000.00	
	Expenses Allowed Per Order of Court of December 7, 1942	1,330.40	
			$6,330.40"

Said Voucher check bore the following endorsement (R. 643):

> "Endorsement
>
> Endorsement of this check acknowledges payment in full for all of the invoices listed on the voucher on the reverse side of this check.
>
> THOMAS W. NEALON"

There is no denial that petitioner cashed the voucher check referred to and accepted and retained the full benefits and fruits of the final order of December 7th, 1942, The final order was based on an *unliquidated* claim.[2]

Nothing further was heard from petitioner until March 31st, 1944, some fifteen (15) months and twenty-one (21) days after the actual receipt of the payment made by the respondent pursuant to such final order, when petitioner filed a document in the District Court entitled:

> "Petition of Thomas W. Nealon requesting this honorable Court to review and rehear final order fixing attorney's fees and expenses of Thomas W. Nealon, made and entered herein on December 7, 1942" (R. 599).

The prayer of said petition is:

> "(a) That the order of this Court entered herein on December 7, 1942, allowing and awarding to petitioner compensation and expenses in the amount therein recited, be vacated for the want of jurisdiction of this Court to render said order, and that a supplemental order be made and substituted therefor by this Court allowing and awarding to petitioner compensation in such amount as now appears from the entire record herein to be right and proper.

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2. Emphasis ours throughout this brief unless otherwise noted.

(b) That this Court, as in the nature of a bill of review, or by an original bill in equity, review said petition filed herein by petitioner on October 15, 1937, and said order entered herein on December 7, 1942, and upon such review that this Court correct the errors of law and fact apparent in said order, and thereupon allow and award to petitioner compensation in such amount as now appears from the entire record herein to be just and proper.

(c) That this Court grant a rehearing of said order entered herein on December 7, 1942, awarding compensation to petitioner, and upon such rehearing that this Court thereupon allow and award to petitioner compensation in such amount for all services performed by petitioner as now appears from the entire record herein to be just and proper.

(d) That this Court modify and revise said order entered herein on December 7, 1942, so as to allow and award compensation to petitioner for all services performed by petitioner as now appears from the entire record herein to be just and proper (R. 618).

(e) That a day be fixed by order of this Court for the hearing of this petition and that said order provide that notice of said hearing be given to said Harry W. Hill, as such receiver.

(f) And for such other and further relief as may appear just and equitable" (R. 619).

In the meantime, and on January 21st, 1944, the Circuit Court in *Monaghan v. Hill,* 140 Fed.(2) 31, held that the $12,500 allowed Mrs. Monaghan was insufficient and that she was entitled to "such a fee as to the District Court may seem right and proper but in a sum not less than $50,000."

After the petitioner filed his petition on March 31st, 1944 (R. 599), the respondent filed his answer (R. 633), the first two defenses of which questioned the jurisdiction of the District Court, and the third defense alleged that the petition "fails to state a claim upon which relief can be granted". The fourth defense was a categorical answer to the petition (R. 633-639). The fifth, sixth and seventh defenses were directed to the payment of the money awarded by the order of December 7th, 1942, and the acceptance of such money by the petitioner (R. 639-643).

An order was made by the District Court following a pretrial conference pursuant to Rule 16 of the Federal Rules of Civil Procedure (R. 643), which order was dated June 7th, 1944.

On November 21st, 1944, petitioner filed a "Motion to Submit Petition" (R. 651), and on the 22nd day of November, 1944, respondent filed a "Motion for Order Denying Petition and Dismissing Same" (R. 653).

Briefs were filed, and on the 22nd day of November, 1944, a stipulation was entered into to submit both motions on briefs without oral argument (R. 652), and an order was made by the District Court that the motions "be and the same are hereby submitted for decision" (R. 653).

On November 22nd, 1944, the District Court, by minute entry, made the following order:

> "It is Ordered that the Receiver's Motion for an Order Denying Petition of Thomas W. Nealon requesting this Honorable Court to review and rehear final order fixing attorney's fees and expenses of Thomas W. Nealon, made and entered herein on De-

cember 7, 1942, and dismissing same be and it is granted" (R. 655-656).

On November 29th, 1944, attorneys for petitioner and respondent were present in Court, and the petitioner stated he desired the record to show that he declined to amend or plead further in the case (R. 657), whereupon the District Court entered its "Final Order Denying Petition and Dismissing Same" (R. 657-658), in which it was, among other things,

> "Ordered, Adjudged and Decreed that the petition of Thomas W. Nealon filed herein on March 31st, 1944, be denied and the same is hereby dismissed with prejudice" (R. 658).

Appeals were taken to the Circuit Court

(a) "* * * from that certain order made and filed herein on December 7, 1942, entitled: 'Final Order Fixing Attorney's Fees and Expenses, and Ordering Payment of Balance Due Thomas W. Nealon,' and entered herein on the Clerk's Docket on December 7, 1942.

(b) "* * * from that certain order made and filed herein on November 29, 1944, entitled: 'Final Order Denying Petition and Dismissing Same,' and entered herein on the Clerk's Docket on November 29, 1944" (R. 666).

The respondent moved in the Circuit Court to dismiss the appeal (R. 690), and filed a brief in support of the motion (R. 694-697). Petitioner replied to the motion. The cause was argued on the motion to dismiss and on the merits, on May 28th, 1945, and ordered submitted (R.

703). The Circuit Court entered its judgment dismissing the appeal with costs (R. 707-708), after filing its opinion (R. 704).

SUMMARY OF THE ARGUMENT

Respondent's argument will be divided into sub-heads which necessarily will cover the points argued by petitioner in support of his Specification of Errors and will likewise present respondent's reasons why certiorari should not be granted in this case. Respondent relies upon the following points in opposition to the petition for writ of certiorari filed herein:

A. A petition for rehearing or a motion for a new trial should have been filed in the District Court within the time provided by the Federal Rules of Civil Procedure in order to have extended the time for appeal from the order of December 7th, 1942; it could have no effect whatever if filed after the term of the District Court had expired, although the petition be considered on the merits.

B. An order or judgment of the District Court which adjudges that an attorney is entitled to compensation in a definite amount and allows a lien therefor on a fund in court and directs payment, is a final order and appealable although no final disposition is made of the residue of the fund.

C. Petitioner in his attempted appeal from the order of December 7th, 1942, was too late, as an appeal from such an order must be taken within three (3) months from the entry thereof.

D. The order of November 29th, 1944, is not a final decision within the meaning of Section 128(a) of the Judicial Code (28 U.S.C.A., Section 225(a)), and is not appealable.

E. Petitioner by accepting the benefits of the order of December 7th, 1942, and retaining the fee allowed thereby, waived his right to appeal therefrom.

F. A bill of review, or a bill in the nature of a bill of review, would not lie in this case in any event because appellant, having accepted the benefits of the order of December 7th, 1942, is now estopped from reviewing same; he cannot accept the benefits of the order and at the same time escape from its burdens.

G. A bill of review for errors apparent on the face of the record will not lie after the time allowed for appeal has elapsed.

ARGUMENT

FOREWORD

Petitioner relies to a great extent on three bankruptcy cases decided by this Court,[3] and urges that these cases, by reason of the proceeding taken in the District Court in the case at bar, permit an appeal to be taken after the time for appeal has elapsed. No seasonable motion for rehearing was under consideration and the term of the District Court had expired. This will be argued first and related matters in their proper order.

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3. *Wayne United Gas Co. v. Owens-Illinois Glass Co.*, 300 U.S. 131; *Bowman v. Lopereno*, 311 U.S. 262; *Pfister v. Northern Illinois Finance Corp.*, 317 U.S. 144.

A. A petition for rehearing or a motion for a new trial should have been filed in the District Court within the time provided by the Federal Rules of Civil Procedure in order to have extended the time for appeal from the order of December 7th, 1942; it could have no effect whatever if filed after the term of the District Court had expired, although the petition be considered on the merits.

The petition or motion for a rehearing or new trial should have been filed within ten (10) days after entry of the order of December 7th, 1942. This is definitely provided for by Rule 59(b), Federal Rules of Civil Procedure, following Section 723C, Title 28, U.S.C.A. Rule 60(b) is inapplicable here because the action taken by petitioner was not within the six (6) months' period provided for by that Rule. At all events, Rule 60(b) does not affect the finality of the order of December 7th, 1942.

Safeway Stores, Inc. v. Coe, etc. et al. (C.C.A. D.C.), 136 Fed.(2) 771;
Jusino v. Morales, etc. (1 Cir.), 139 Fed.(2) 946;
4 *Cyc. Fed. Proc.* (2nd Ed.), page 310.

Petitioner urges that by the provisions of Rule 6(c)[4] terms of court in some manner have been *abolished* and cites in support of that position *Sprague v. Ticonic National Bank*, 307 U.S. 161.

The regular terms of the District Court where this case was tried begin on the first Mondays in April and Octo-

4. "6(c) *Unaffected by Expiration of Term.* The period of time provided for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court. The expiration of a term of court in no way affects the power of a court to do any act or take any proceeding in any civil action which has been pending before it."

ber. (*Gee Lung, et al. v. United States* (9 Cir.), 111 Fed. (2) 640.) Several terms expired since the order of December 7th, 1942, was entered. Rule 6 has to with "time". Subdivision (c) of the Rule provides in effect that the period of time for the doing of any act or the taking of any proceeding is not affected or limited by the expiration of a term of court and that the expiration of a term of court in no way affects the power of a court to do any act or take any proceedings in any civil action which has been pending before it. This makes terms of court "anachronistic", as stated by Mr. Justice Frankfurter in *Sprague v. Ticonic National Bank, supra.* Mr. Justice Frankfurter did not say that terms of court were *abolished* by Subdivision (c) of Rule 6. He said in effect that where, under the rules, a time is set within which a proceeding must be taken in a pending action, if the term of court in the meantime expires, so long as the action is taken within the time provided by the rules, the expiration of the term of court does not affect such action. A careful reading of footnote 9 to the *Sprague* case demonstrates the soundness of this. Compare:

Safeway Stores, Inc. v. Coe, et al. (C.C.A. D.C.), 136 Fed.(2) 771, 774, 775;

National Popsicle Corporation et al. v. Hughes (D.C. Cal.), 32 Fed. Supp. 397;

Bateman v. Donovan (9 Cir.), 131 Fed.(2) 759, 764.

Respondent has cited:

Wayne United Gas Co. v. Owens-Illinois Glass Co., 300 U.S. 131;

Bowman v. Lopereno, 311 U.S. 262;

Pfister v. Northern Illinois Finance Corp., 317 U.S. 144.

These last cited cases all refer to bankruptcy matters, and this Honorable Court has repeatedly held that a court of bankruptcy sits continuously and has no terms. As stated in *Wayne United Gas Co. v. Owens-Illinois Glass Co., supra:*

> "A court of equity may grant a rehearing, and vacate, alter, or amend its decree, after an appeal has been perfected and after the time for appeal has expired, *but not after expiration of the term* at which the decree was entered. It is true the bankruptcy court applies the doctrine of equity, but the fact that *such a court has no terms,* and sits continuously, renders inapplicable, the rules with respect to the want of power in a court of equity to vacate a decree after the term at which it was entered has ended."

As stated by the Circuit Court in the case below (149 Fed.(2) 883), the petition for rehearing was filed after the time prescribed in Rule 59(b) of the Federal Rules of Procedure, 28 U.S.C.A., following 723(c) and after the expiration of the time for appealing from the order *and after the expiration of the term at which the order was entered,* and that the petition, not having been seasonably filed, the time for appealing was not enlarged and extended. This holding is eminently correct.

It is our position that this being a civil action, equitable in nature, and not a petition in a bankruptcy proceeding, *Wayne Gas Co. v. Owens-Illinois Glass Co.,* 300 U.S. 131, and the two later cases relied upon by petitioner, are not in point.

Petitioner also urges that the order relating to his services as attorney for the receiver decided a claim

that was not in issue. The Court had jurisdiction to render the order and whether it was rightfully or wrongfully entered cannot now be inquired into as the remedy was by an appeal from the order.

Allen v. Allen, et al. (9 Cir.), 97 Fed. 525, 530, 531;
Treinies, et al. v. Sunshine Mining Co., et al. (9 Cir.), 99 Fed.(2d) 651, 655;
Roche v. McDonald, 275 U.S. 449, 454;
Boundary County, Idaho, et al. v. Woldson (9 Cir.), 144 Fed.(2d) 17, 19;
Wells Fargo & Co. v. City and County of San Francisco (Calif.), 152 Pac.(2d) 625, 628.

B. An order or judgment of the District Court which adjudges that an attorney is entitled to compensation in a definite amount and allows a lien therefor on a fund in court and directs payment, is a final order and appealable although no final disposition is made of the residue of the fund.

Petitioner, in asking the District Court to review and rehear its order of December 7th, 1942 (R. 599), contended that the order was not a *final* order (R. 610, 617, 618). That position was abandoned by petitioner in the Circuit Court because that question, in view of *Monaghan v. Hill* (9 Cir.), 140 Fed.(2) 31, became academic. Petitioner here again questions the finality of the order of December 7th, 1942.[5]

Ignoring for the moment the proposition that petitioner after having accepted the benefits of the order of December 7th, 1942, could not appeal therefrom, it goes without saying that if petitioner was dissatisfied with the fee

5. See argument beginning on page 29 of the Petition for Writ of Certiorari and Supporting Brief.

allowed him by the District Court's order of December 7th, 1942, he should, in all events, have appealed within the time provided by statute, i.e., within three (3) months, inasmuch as the order entered was final. Compare:

Monaghan v. Hill (9 Cir.), 140 Fed.(2) 31;
Trustees v. Greenough, 105 U.S. 527;
Reeves v. Beardall, 316 U.S. 283;
Dexter Horton National Bank of Seattle v. Hawkins, et al. (9 Cir.), 190 Fed. 924;
Gripton v. Richardson (9 Cir.), 82 Fed.(2) 313;
Gelberg v. Richardson (9 Cir.), 82 Fed.(2) 314, 315;
Tuttle v. Claflin (2 Cir.), 88 Fed.(2) 122;
Jacksonville, T. & K. W. Ry. Company, et al. v. American Construction Company, et al. (5 Cir.), 57 Fed. 66;
Ruggles, et al. v. Patton (6 Cir.), 143 Fed. 312;
Central Trust Co. of New York v. United States Light & Heating Co., et al. (2 Cir.), 233 Fed. 420;
Sawyer v. Ellis, et al., 36 Ariz. 419, 286 Pac. 189;
Cyc. Fed. Proc. (2d Ed.), Vol. 10, page 252.

In *Cyc. Fed. Proc., supra,* it appears that:

"An order relating to attorney's fees and disbursements is appealable where a final decision, but not otherwise, as where it is in one of its substantial parts reserved for further adjudication. *A decree which adjudges that an attorney is entitled to compensation in a definite amount and allows a lien therefor on a fund in court, and directs payment, is appealable although no final disposition is made of the residue of the fund.*"

These cases are not to be confused with *Heinze v. Butte and Boston Consolidated Mining Company,* 129 Fed. 337,

and *Colley v. Wolcott,* 187 Fed. 595, and like cases. In the *Heinze* case, there was *an interlocutory order* confirming a receiver's report and directing the receiver to pay expenses incurred by him before the coming on of his final account. This was held not a final order. In the *Colley* case, an allowance was made for services of attorneys but the order provided that the allowance should be thereafter paid in such manner *as the court should direct.* This was held *not to be a final order.* Neither of these cases portray the situation in the case at bar.

Petitioner, not having appealed from the final order of the District Court within the time provided by Title 28, Section 230, U.S.C.A., the Circuit Court was without jurisdiction to do other than dismiss the appeal taken December 7th, 1944, exactly two years after the order of December 7th, 1942 (R. 666).

C. Petitioner in his attempted appeal from the order of December 7th, 1942, was too late, as an appeal from such an order must be taken within three (3) months from the entry thereof.

It appears from the record that no motion or petition for rehearing, or for other relief, was directed to the final order of December 7th, 1942, until March 31st, 1944, fifteen months and twenty-four days after the entry of the order of December 7th, 1942, and fifteen months and twenty-one days after the actual payment by the respondent receiver to the petitioner of the moneys awarded by that order. The first portion of the Notice of Appeal (R. 666) is late because taken more than three (3) months after the order of December 7th, 1942, was entered, there being no motion or petition under advisement during the

period from December 7th, 1942, to March 31st, 1944. The District Court having lost jurisdiction over its order of December 7th, 1942, the Circuit Court likewise was without jurisdiction to review that order as the same became final and the time to appeal expired three (3) months after entry of the order.

Title 28, Section 230, U.S.C.A.;
Monaghan v. Hill (9 Cir.), 140 Fed.(2) 31, 33.

If the petition had been timely, the rule would not be applicable because the order would not be final for appeal purposes.

Mitchell v. Maurer (9 Cir.), 67 Fed.(2d) 286.

D. The order of November 29th, 1944, is not a final decision within the meaning of Section 128(a) of the Judicial Code (28 U.S. C.A., Section 225(a)), and is not appealable.

The second portion of the Notice of Appeal is from the order denying and dismissing petition made and entered by the District Court on November 29th, 1944 (R. 666). The order of November 29th, 1944, is not appealable. Compare:

10 *Cyc. Fed. Proc.* (2nd Ed.), Section 4892;
Conboy v. First National Bank of Jersey City, 203 U.S. 141;
Pfister v. Northern Ilinois Finance Corp., 317 U.S. 144;
Donovan v. Jeffcott, et al. (9 Cir.), 147 Fed.(2d) 198;
Wayne United Gas Co. v. Owens-Illinois Co., 300 U.S. 131;

Cuno Corp. v. Hudson Auto Supply Co. (2 Cir.), 49 Fed.(2) 654 (second case);

Bondholders and Purchasers of the Iron Railroad v. Toledo, D. & B. R. Co. (7 Cir.), 62 Fed. 166 (certiorari denied), 166 U.S. 721.

E. Petitioner by accepting the benefits of the order of December 7th, 1942, and retaining the fee allowed thereby, waived his right to appeal therefrom.

The Circuit Court in its opinion did not directly pass upon the question of whether the petitioner, by accepting the benefits of the order of December 7th, 1942, waived his right to appeal therefrom, stating that that point need not be considered. *Nealon v. Hill* (9 Cir.), 149 Fed.(2) 883 at 885 (R. 706).

Petitioner in his Brief here suggests, that if this Court concludes that the question of waiver arising from accepting the benefits of the order should be considered and disposed of, that an opportunity be accorded him to present his position on that question by supplemental brief. Inasmuch as this question is highly important and is discussed by the Circuit Court in its opinion and was one of the main grounds invoked in the Circuit Court by the respondent in his Motion to Dismiss Appeal (R. 694, 695), respondent feels that the matter should be presented in opposition to the petition for the reason that if the Circuit Court's holding that the appeals should be dismissed was correct upon any theory, there would be no necessity to grant certiorari as the final result would be the same.

It is respondent's contention that the petitioner, *a lawyer*, with full knowledge of the facts, having voluntarily accepted from respondent the money ordered paid

in discharge of the order, could not prosecute an appeal to the Circuit Court in the hope of obtaining a more satisfactory order. In short, the settlement of the order by the respondent strictly in accordance with its terms extinguished all matters between the parties and left nothing for the decision of the Circuit Court. The question became moot and at all events petitioner, by his action, was estopped from questioning the order. *This would be applicable even if the appeal was taken within the time provided by statute* and is doubly applicable where not taken until after the expiration of the term at which the order was entered.

It is the general rule that a party cannot accept the benefits of a judgment, order or decree and afterwards prosecute an appeal or writ of error to review the same; and that he cannot, in case of interdependent provisions, accept the benefits of the part which is favorable and appeal from the part which is unfavorable; nor can he, in making such acceptance, reserve the right to appeal. In the Circuit Court the respondent urged that if what is sometimes known as the "State Law Conformity Act",[6] or the doctrine laid down by this Court in *Erie Railroad Company v. Tompkins,* 304 U.S. 64, and *Ruhlin v. New York Life Ins. Co.,* 304 U.S. 202, was applicable, then the law of the State of Arizona would foreclose petitioner's attempted appeal to the Circuit Court.

If the Arizona law is to be followed, petitioner could

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6. Section 725, Title 28, U.S.C.A., reads: "The laws of the several states, except where the constitution, treaties or statutes of the United States otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

not successfully appeal to the Circuit Court after having accepted the fruits of the order of December 7th, 1942. See:

Shannon Copper Co. v. Potter, 14 Ariz. 481; 131 Pac. 157;

Brown v. Kester, 39 Ariz. 545, 8 Pac.(2) 453;

Frankel v. Frankel, 41 Ariz. 396, 18 Pac.(2) 911.

Intermountain Building & Loan Association, of which respondent is receiver, is a Utah corporation. Under the law of Utah, an appeal, under the circumstances here present, would not lie. See:

Sierra Nevada Mill Co. v. Keith O'Brien Co., 48 Utah 12, 156 Pac. 943, 946, 947;

Ottenheimer, et al. v. Mountain States Supply Co., 56 Utah 190, 188 Pac. 1117, 1118;

Moon v. Bollwinkle, et al., 47 Utah 389, 154 Pac. 939, 940.

Under the general law an appeal would not lie. Compare:

U. S., et al. v. Benedict, 261 U.S. 294;

Singer Mfg. Co. v. Wright, 141 U.S. 696;

Little v. Bowers, 134 U.S. 547;

Smith v. Morris, et al. (3 Cir.), 69 Fed.(2) 3;

Kaiser v. Standard Oil Co. of New Jersey (5 Cir.), 89 Fed.(2) 58;

Albright, et al. v. Oyster, et al. (8 Cir.), 60 Fed. 644;

Oriole Phonograph Co. v. Kansas City, etc. (8 Cir.), 34 Fed.(2) 400, 401;

Denney v. Fort Recovery Banking Company (7 Cir.), 135 Fed.(2) 184, 186;

Altman v. Shopping Center Bldg., et al. (8 Cir.), 82 Fed.(2) 521 at 527;

Re Greenpoint Metallic Bed Co., Inc. (2 Cir.), 113 Fed.(2) 881, 884;

4 *C. J. S.*, "Appeal and Error", Paragraphs 215, 216, page 414;

2 *Am. Jur.*, Paragraph 214, page 975 (and see on page 977);

10 *Cyc. Fed. Proc.* (2nd Ed.), page 503.

Smith v. Morris, supra (69 Fed.(2) 3), is directly in point:

> "We pass by that question (Stuart v. Boulware, 133 U.S. 78, 10 S.Ct. 242, 33 L.Ed. 568) and come to one *which is not debatable.* That question arises on the receivers' motion to dismiss the appeal and may be stated thus:
>
> "If there is in any case a right of appeal in a matter of fees, whether Mr. Smith has waived that right by accepting and retaining the fee allowed him by the order appealed from?
>
> "Actually, Mr. Smith is appealing from the whole order. Although it contains two paragraphs, one denying the allowance of joint fees, the other allowing Mr. Smith a separate fee, it is but one order, the two paragraphs being related and consistent one with the other. Mr. Smith is endeavoring to appeal from that part of the order which denied his contention that he is a joint solicitor with Richards, Layton and Finger, and, accordingly, denied him an allowance as such, while at the same time he is retaining the benefits of the order by which he, separately, was allowed, and paid, $5,000, with the allowance distinctly marked 'as full and final compensation for his services.' In

doing this, he is confronted by a rule of law, than which none is better settled, that one 'who accepts the benefits or any substantial part of the benefits of a judgment or decree is thereby estopped from reviewing and escaping from its burdens.' He cannot avail himself of its advantages, and then question its disadvantages in a higher court. (Citing cases.)"

If the Circuit Court had considered the point here presented, it would have rightfully dismissed the appeal on the record no matter whether it considered (1) the law of Arizona; (2) the law of Utah; or (3) the general law, as being applicable.

F. A bill of review, or a bill in the nature of a bill of review, would not lie in this case in any event because appellant, having accepted the benefits of the order of December 7th, 1942, is now estopped from reviewing same; he cannot accept the benefits of the order and at the same time escape from its burdens.

A bill of review, or a bill in the nature of a bill of review, would not lie by the same token that an appeal would not lie, because petitioner accepted the fruits of the order of December 7th, 1942. In support of this proposition, respondent cites:

Hill, et al. v. Phelps, et al. (8 Cir.), 101 Fed. 650;

Home St. Ry. Co., et al. v. City of Lincoln (8 Cir.), 162 Fed. 133;

Albright, et al. v. Oyster, et al. (8 Cir.), 60 Fed. 644;

Chase v. Driver, 92 Fed. 780, 786;

Brigham City v. Toltec Ranch Co., 101 Fed. 85;

Central Hanover Bank, et al. v. Wardman, etc., 31 Fed. Supp. 685, 688 (citing *Hill v. Phelps*, supra).

G. A bill of review for errors apparent on the face of the record will not lie after the time allowed for appeal has elapsed.

The Circuit Court in its opinion in the instant case held that the petition filed in the District Court by petitioner on March 31st, 1944, was not, and did not purport to be, a bill of review, or a bill in the nature of a bill of review, citing *Hazel-Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238 (R. 705). The Circuit Court stated that the petition was merely a petition for rehearing.

There is no claim by petitioner that there was any fraud in the order nor is any newly discovered evidence claimed. If it could be considered that this is a bill of review for errors apparent on the face of the record, such a bill would not lie after the time allowed for appeal has elapsed. See:

Thomas v. Brockenbraugh, et al., 23 U.S. 146, 150;

Central Trust Co. v. The Grant Locomotive Works, etc., 135 U.S. 207, 227;

Peeke v. Citizens Bank Company etc. (6 Cir.), 81 Fed.(2) 112;

Jorgenson v. Young (9 Cir.), 136 Fed. 378;

Reed, et al. v. Stanley, et al. (9 Cir.), 97 Fed. 521;

Farmers & Merchants Bank v. Arizona M. & L. Ass'n (9 Cir.), 220 Fed. 1, 7;

Hagerott v. Adams (8 Cir.), 61 Fed.(2) 35, 36;

Blythe Co. v. Hinckley, et al. (9 Cir.), 111 Fed. 827, 837, 841;

Hendryx, et al. v. Perkins (1 Cir.), 114 Fed. 801, 804;

Chamberlin v. Peoria etc. (7 Cir.), 118 Fed. 32, 34;

Cocke, et al. v. Copenhaven, et al. (4 Cir.), 126 Fed. 145, 147;

In re Holmes, 142 Fed. 391, 393, 394;
In re Stearns & White Co., 295 Fed. 833, 839, 840;
Taylor v. Easton, 180 Fed. 363;
Home St. Ry., et al. v. City of Lincoln (8 Cir.), 162 Fed. 133;
19 *Am. Jur.,* Sec. 444, page 306;
Cyc. Fed. Proc. (2d Ed.), Vol. 8, Sec. 3602, pages 350, 351.

CONCLUSION

In his petition for writ of certiorari (page 11), petitioner states that the Circuit Court of Appeals by dismissing his appeal has erroneously decided an important question of Federal practice, which has not been settled by this Court, and that it has decided a question of Federal practice pertaining to a receivership proceeding in equity not closed in a way probably in conflict with applicable decisions of this Court. The only cases from this Court cited by petitioner are *Wayne United Gas Co. v. Owens-Illinois Glass Co., Bowman v. Lopereno,* and *Pfister v. Northern Illinois Finance Co.,* which respondent believes he has shown are not applicable here, because the instant case sought to be reviewed is not a bankruptcy proceeding in any sense of the word.

The other case from this Court relied upon for the purpose of showing apparently that terms of court have been abolished is *Sprague v. Ticonic National Bank.* There is no question but that petitioner has misinterpreted the holding in that case.

Bateman v. Donovan (9 Cir.), 131 Fed.(2) 759, and *Bucy v. Nevada Const. Co.* (9 Cir.), 125 Fed.(2) 213, do

not in any way conflict with *Nealon v. Hill*, 149 Fed.(2) 883, which the petitioner seeks to have this Court review.

We believe that the granting of certiorari in this case would in the end not settle any question that has not already been settled by this Court and that even if the writ were granted, in view of the other points not passed upon by the Circuit Court, particularly the acceptance of the fruits of the order of December 7th, 1942, by the petitioner, the result would be the same, i.e., dismissal of the appeal by the Circuit Court.

Respectfully submitted,

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